

**United States Department of Labor
Employees' Compensation Appeals Board**

S.W., Appellant

and

**DEPARTMENT OF JUSTICE, FEDERAL
BUREAU OF PRISONS, Marion, IL, Employer**

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**Docket No. 12-1411
Issued: November 27, 2012**

Appearances:

Alan J. Shapiro, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge

MICHAEL E. GROOM, Alternate Judge

JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 18, 2012 appellant, through his attorney, filed a timely appeal of a May 7, 2012 schedule award decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award issue.

ISSUE

The issue is whether appellant sustained more than six percent permanent impairment of the right arm, for which he received a schedule award.

FACTUAL HISTORY

On April 9, 2010 appellant, then a 39-year-old electronic equipment repairman, sustained right shoulder pain when he removed a tool bin from a shelf. OWCP accepted his traumatic injury claim for unspecified right shoulder bursa and tendon disorder and right supraspinatus

¹ 5 U.S.C. § 8101 *et seq.*

sprain, right ulnar nerve lesion and right tenosynovitis. Appellant underwent right shoulder arthroscopy on June 16, 2010 and right elbow arthroscopy, posterior interosseous nerve release, and ulnar nerve decompression on September 10, 2010. Both procedures were authorized by OWCP.

Appellant filed a claim for a schedule award on August 3, 2011 and submitted November 1 and 5, 2010 progress notes from a physical therapist.² In an October 5, 2011 letter, OWCP advised him that additional evidence was needed to establish his claim. It afforded 30 days to submit an impairment rating from a qualified physician that utilized the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).³

In an October 27, 2011 report, Dr. Richard C. Lehman, a Board-certified orthopedic surgeon, related that appellant experienced right fourth and fifth digit radicular pain following multiple surgeries, but otherwise exhibited functional elbow and shoulder range of motion (ROM). Applying Table 15-5 (Shoulder Regional Grid) on pages 401-05 of the A.M.A., *Guides*, he assigned impairment ratings of two percent for right shoulder sprain, two percent for right shoulder tendinitis and two percent for rotator cuff injury, respectively. Dr. Lehman combined these values and concluded that appellant had six percent permanent impairment of the right upper extremity. He identified May 19, 2011, the date of appellant's most recent examination, as the date of maximum medical improvement.⁴

Dr. Michele D. Koo, a Board-certified plastic surgeon, commented in a November 7, 2011 report that appellant showed positive results from the September 10, 2010 surgery. During a January 10, 2011 physical examination, she observed full hand, wrist, forearm, and elbow ROM without pain or discomfort, excellent grip strength and a negative Tinel's sign.⁵ Dr. Koo, without citation, assigned an impairment rating of two percent: one percent for right elbow ulnar nerve submuscular transposition and one percent for dorsal forearm surgery and scarring.

On March 26, 2012 Dr. David H. Garelick, an OWCP medical adviser and Board-certified orthopedic surgeon, reviewed Dr. Lehman and Dr. Koo's reports. He concluded that Dr. Lehman's impairment rating of six percent was reasonable in view of the A.M.A., *Guides*, as Dr. Koo's opinion was not corroborated by her objective findings.

By decision dated May 7, 2012, OWCP granted a schedule award for six percent permanent impairment of the right upper extremity for the period May 20 to September 28, 2011.

² Appellant did not initially furnish the employing establishment portion of the Form CA-7, which was later filed on August 22, 2011.

³ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2008).

⁴ The case record also contains Dr. Lehman's May 19, 2011 report.

⁵ The case record also contains Dr. Koo's January 10, 2011 report.

LEGAL PRECEDENT

The schedule award provision of FECA and its implementing regulations set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss of or loss of use of scheduled members or functions of the body.⁶ However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁷

The A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF). For upper extremity impairments, the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS). The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).⁸ Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.⁹

ANALYSIS

OWCP accepted that appellant sustained unspecified right shoulder bursa and tendon disorder, right supraspinatus sprain, right ulnar nerve lesion and right tenosynovitis while in the performance of duty and authorized multiple right upper extremity surgeries on June 16 and September 10, 2010. After appellant filed a claim for a schedule award on August 3, 2011, OWCP received an October 27, 2011 impairment rating report from Dr. Lehman. Based on Table 15-5 of the A.M.A., *Guides*, Dr. Lehman calculated a rating of six percent for appellant's right shoulder conditions. Dr. Garelick concurred with this rating on March 26, 2012 and OWCP granted a corresponding schedule award on May 7, 2012. Appellant appeals on the grounds that he is entitled to a greater award.

The Board finds that the medical evidence does not establish that appellant sustained more than six percent permanent impairment of the right upper extremity. In a November 7, 2011 report, Dr. Koo calculated an additional two percent permanent impairment of the right upper extremity on account of right elbow ulnar nerve submuscular transposition and dorsal forearm surgery; however, she did not cite the A.M.A., *Guides* at any point. According to OWCP procedures, an attending physician's impairment rating report must include a detailed description of the impairment and a rationalized opinion as to the percentage of permanent

⁶ 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

⁷ *K.H.*, Docket No. 09-341 (issued December 30, 2011). For decisions issued after May 1, 2009, the sixth edition will be applied. *B.M.*, Docket No. 09-2231 (issued May 14, 2010).

⁸ *R.Z.*, Docket No. 10-1915 (issued May 19, 2011).

⁹ *J.W.*, Docket No. 11-289 (issued September 12, 2011).

impairment under the A.M.A., *Guides*.¹⁰ When the attending physician fails to provide a rating that conforms to the A.M.A., *Guides*, his or her opinion is of diminished probative value in establishing the degree of permanent impairment.¹¹ Because Dr. Koo failed to utilize the A.M.A., *Guides*, her report was of limited probative value regarding the extent of appellant's right upper extremity impairment.¹²

Appellant also provided November 1 and 5, 2010 progress notes from a physical therapist. To support a claim for a schedule award, an employee must submit an impairment rating from a qualified physician that is in accordance with the A.M.A., *Guides*.¹³ A physical therapist, however, is not a physician as defined by FECA and is not competent to rate impairment of a scheduled member or otherwise render a medical opinion.¹⁴ The progress notes lack evidentiary weight.¹⁵ In the absence of other impairment rating reports that conform to the A.M.A., *Guides* and demonstrate greater impairment, the Board finds that appellant did not sustain more than six percent permanent impairment of the right upper extremity.

Counsel argues on appeal that the May 7, 2012 decision is contrary to fact and law. The Board has addressed the deficiencies of the medical evidence.

Appellant submitted new evidence after issuance of the May 7, 2012 decision. The Board, however, lacks jurisdiction to review evidence for the first time on appeal.¹⁶ Appellant may request an increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant did not sustain more than six percent permanent impairment of the right upper extremity.

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6(a)-(c) (January 2010).

¹¹ *Linda Beale*, 57 ECAB 429, 434 (2006). *See also James Kennedy, Jr.*, 40 ECAB 620, 627 (1989).

¹² The Board further adds, in agreement with Dr. Garelick, that Dr. Koo's own findings seemingly undermined her opinion in support of partial impairment. *See Robert P. Bourgeois*, 45 ECAB 745 (1994); *Kenneth J. Deerman*, 34 ECAB 641 (1983) (medical evidence must necessarily convince the adjudicator that the conclusion drawn is rational, sound and logical).

¹³ *James Robinson, Jr.*, 53 ECAB 417 (2002).

¹⁴ *See id.* *See also* 5 U.S.C. § 8101(2).

¹⁵ *E.O.*, Docket No. 12-517 (issued July 6, 2012).

¹⁶ 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the May 7, 2012 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: November 27, 2012
Washington, DC

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board